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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NO. 26,567

70-171

ODELL ANDREWS and WILLIE SLOAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	PAGE
Table of Authorities Cited.....	A
Petition.....	i.
Opinions Below.....	ii.
Grounds on which the jurisdiction of this Court is invoked.....	ii.
Questions presented for review.....	iii.
Statement of the Case.....	v.
Constitutional Provisions and Statutes involved.....	vii.
Statement of the Facts.....	1.
Reasons for granting the writ and amplifying the same.....	23.

I.

AFTER RELYING ON THE PRESUMPTION DECLARED UNCONSTITUTIONAL IN THE LEARY CASE AND AFTER THE APPELLATE COURT REVERSED THE CAUSE, THE TRIAL JUDGE DECLINED TO PERMIT NEW EVIDENCE OR A NEW TRIAL BUT SIMPLY STATED THAT HE HAD NOT RELIED ON THE PRESUMPTION TO 'SHOW KNOWLEDGE OF ILLEGAL IMPORTATION IN THE FIRST INSTANCE, BUT RATHER BASED HIS FINDINGS ON INDEPENDENT EVIDENCE. HOWEVER, NO SUCH EVIDENCE EXISTED. MOREOVER, THIS COURT SHOULD NOT PLACE ITS IMPRIMATUR ON A METHOD SO SUSCEPTIBLE OF DENYING THE DEFENDANT A FAIR HEARING..... 23.

II

PETITIONERS WERE COERCED INTO WAIVING THEIR RIGHT TO A JURY TRIAL BY VIRTUE OF THE PRESUMPTION UNDER 21 U.S.C. 176(a)

PAGE

AUTHORIZING THE TRIAL JURY BUT NOT THE COURT TO PRESUME FROM THE FACT OF POSSESSION OF MARIJUANA ALL FURTHER FACTS ESSENTIAL TO PROOF OF GUILT..... 28.

III

THE INTRODUCTION INTO EVIDENCE, OVER OBJECTION, OF THE TESTIMONY OF THE WITNESS BUCHER PURPORTING TO RECITE INFORMATION FURNISHED HIM BY ONE "BUCK" ROBINSON BELOW THE MEXICAN BORDER AT A TIME PRIOR TO THE TRANSPORTATION OF MARIJUANA INTO THE UNITED STATES CONSTITUTED INADMISSIBLE HEARSAY USED TO ESTABLISH PETITIONERS' KNOWLEDGE OF THE FOREIGN SOURCE OF THE CONTRABAND AND WAS VIOLATIVE OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION..... 32.

IV

THE CASE AGAINST PETITIONERS WAS PREDICATED UPON THEIR POSSESSION OF ONE KILOGRAM OF MARIJUANA PLACED IN THE TRUNK OF A CAR UNBEKNOWNST TO THEM AND THEN DELIVERED TO A GARAGE WHERE THEY ACTED IN A FASHION CONSISTENT ONLY WITH THEIR LACK OF KNOWLEDGE OF THE CONTRABAND. THE BASIC ELEMENTS NOT ONLY OF THE CRIMES THEMSELVES BUT FEDERAL JURISDICTION WERE THEREFORE LACKING 41.

INDEX TO APPENDICES

PAGE

Appendix "A" - Opinion of the court below

Appendix "B" - Opinion of the court below 1-3

TABLE OF AUTHORITIES CITED

CASES	PAGE
Alford v. North Carolina 4th Cir.(1968); 405 F2d 340	30
Bailey v. United States D.C. Cir.(1968); 405 F2d 1352	30
Berger v. United States 295 U.S. 78; 55 S.Ct.629 (1935)	37
Bruton v. United States 391 U.S. 123; 88 S.Ct. 1620(1968)	40
Carbo v. United States (9th Cir.1963); 314 F2d 718(1963)	32
Delgado v. United States C.A.9th(1964); 327 F2d 641	44
Douglas v. Alabama 380 U.S. 415;85 S.Ct. 1074(1965)	38,39
Fiswick v. United States 329 U.S. 211;67 S.Ct. 224(1946)	37
Garner v. Louisiana 368 U.S. 157; 82S.Ct. 248(1961)	46
Glasser v. United States 315 U.S. 60,75;62 S.Ct. 457,467(1942)	32
Hernandez v. United States 9th Cir.1962,300 F2d 114,120-121	33,41,42, 43,46

	PAGE
Jackson v. Denno	
378 U.S. 368,84 S.Ct. 1774(1964)	41
Kotteakos v. United States	
328 U.S. 750,66 S.Ct. 1239 (1946)	36
Krulewitch v. United States	
336 U.S.440,445;69 S.Ct. 716,719 (1949)	36,37
Leary v. United States	
395 U.S.6,89 S.Ct. 1532 (1969)	24,25,26, 27,36
McClain v. United States	
9th Cir.1969,417 F2d 489.	31
Minner v. United States	
(10th Cir.1932),57 F2d,506.	32
North Carolina v. Alford	
91 S.Ct. 160 (1970)	30
People v. Aranda	
63 Cal.2d 518,47 Cal.Rptr.353(1965)	39,40
People v. Gory	
28 C2d 450	44
People v. Monson	
255 C.A. 2d 689	44
People v. Williams	
239 Cal.App.2d 42,48;Cal Rptr.421 (1965)	39
Pointer v. Texas	
380 U.S.400; 858.Ct. 1065 (1965)	38,39

PAGE

Pope v. United States

392 U.S. 651;88 S.Ct.2145(1948) 30

Qualen v. United States

(9th Cir.1970)425 F2d 720 26

Thompson v. Louisville

362 U.S.199;80 S.Ct. 624 (1960) 46

United States v. Jackson

390 U.S.570;88S.Ct.1209(1968) 28,29,30

STATUTES AND CODES

18 U.S.C. 371 41

21 U.S.C., Section 174
21 U.S.C.A.,Section 174 41,42

21 U.S.C.,Section 176(a) 23,28,41

IN THE

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ODELL ANDREWS and WILLIE SLOAN,

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners, Odell Andrews and Willie Sloan, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States District Court for the Central District of California, sentencing petitioners to terms of five years imprisonment.

OPINIONS BELOW

Trial in the Federal District Court was by Court. The opinion of the Court below reversing the convictions and remanding the causes is appended hereto as Appendix "B", and is also found in the Clerks Record of the Circuit Court. The original opinion of the Court below is reported at 426 F2d 1304 (9th Cir. 1970). After the reversal the District Court, without granting a new trial or taking new evidence, again found Petitioners guilty. On a second appeal the Judgment was affirmed. The Second opinion of the Ninth Circuit Court of Appeal is appended hereto as Appendix "A". That opinion is, as yet, unreported. The Judgment of the Court below is contained in the Clerk's transcript from the Circuit Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of judgment sought to be reviewed and the time of its entry is April 13, 1971. (R.C.A. Judgment)

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by Writ of Certiorari is

28 U.S.C. 1254 (9).

QUESTIONS PRESENTED FOR REVIEW

I

AFTER RELYING ON THE PRESUMPTION DECLARED UNCONSTITUTIONAL IN THE LEARY CASE AND AFTER THE APPELLATE COURT REVERSED THE CAUSE, THE TRIAL JUDGE DECLINED TO PERMIT NEW EVIDENCE OR A NEW TRIAL BUT SIMPLY STATED THAT HE HAD NOT RELIED ON THE PRESUMPTION TO SHOW KNOWLEDGE OF ILLEGAL IMPORTATION IN THE FIRST INSTANCE, BUT RATHER BASED HIS FINDINGS ON INDEPENDENT EVIDENCE. HOWEVER, NO SUCH EVIDENCE EXISTED. MOREOVER, THIS COURT SHOULD NOT PLACE ITS IMPRIMATUR ON A METHOD SO SUSCEPTIBLE OF DENYING THE DEFENDANT A FAIR HEARING.

II

PETITIONERS WERE COERCED INTO WAIVING THEIR RIGHT TO A JURY TRIAL BY VIRTUE OF THE PRESUMPTION UNDER 21 U.S.C. 176(a) AUTHORIZING THE TRIAL JURY BUT NOT THE COURT TO PRESUME FROM THE FACT OF POSSESSION OF MARIJUANA ALL FURTHER FACTS ESSENTIAL TO PROOF OF GUILT.

III

THE INTRODUCTION INTO EVIDENCE, OVER OBJECTION, OF THE TESTIMONY OF THE WITNESS BUCHER PURPORTING TO RECITE INFORMATION FURNISHED HIM BY ONE "BUCK" ROBINSON BELOW THE MEXICAN BORDER AT A TIME PRIOR TO THE

TRANSPORTATION OF MARIJUANA INTO THE UNITED STATES CONSTITUTED INADMISSIBLE HEARSAY USED TO ESTABLISH PETITIONERS' KNOWLEDGE OF THE FOREIGN SOURCE OF THE CONTRABAND AND WAS VIOLATIVE OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION.

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THE CASE AGAINST PETITIONERS WAS PREDICATED UPON THEIR POSSESSION OF ONE KILOGRAM OF MARIJUANA PLACED IN THE TRUNK OF A CAR UNBEKNOWNST TO THEM AND THEN DELIVERED TO A GARAGE WHERE THEY ACTED IN A FASHION CONSISTENT ONLY WITH THEIR LACK OF KNOWLEDGE OF THE CONTRABAND. THE BASIC ELEMENTS NOT ONLY OF THE CRIMES THEMSELVES BUT FEDERAL JURISDICTION WERE THEREFORE LACKING.

STATEMENT OF THE CASE

Odell Andrews and Willie Sloan were charged in one indictment with two counts of violating Section 176(a) of Title 21 U.S.C. The date of indictment was April 10, 1968. Count I charged Petitioners and one other person with conspiring to import, receive and conceal marijuana transported from Mexico (C.T. 1-3.) Count II, which was based on the activities alleged in Count I, charged them with receiving and concealing marijuana with knowledge of unlawful importation. (C.T. 4.)

On May 14, Petitioners waived jury. (C.T. 7.) On May 16th, Petitioners moved to suppress certain exhibits, and also requested a ruling that the statutory presumption of knowledge of unlawful importation, as set forth in Section 176(a) of Title 21, U.S.C., was inapplicable to non-jury trials. The Court ruled to the contrary.(R.T. 5-8.) The Court likewise denied Petitioners motion to suppress evidence. (C.T. 9.)

Trial proceeded on May 16, 1968. (C.T. 9.) On May 17, Petitioners motions for

judgment of acquittal were denied, (C.T. 10) and after further trial proceedings, the court found each Petitioner guilty on both Counts of the Indictment. (C.T. 10.) On June 17, 1968, after written and oral arguments were received by the court, Petitioners' motions for new trial and for arrest of judgment were denied, and the court pronounced concurrent judgments of five years imprisonment on each Count. Bail on appeal was granted. (C.T. 31-32.) Notice of Appeal and designation of the record on appeal were filed on the same date, June 17, (C.T. 33-35.) On June 18, the trial court granted its order permitting appeal in forma pauperis. (C.T. 39.)

On May 11, 1970, the Ninth Circuit Court of Appeals handed down its opinion reversing the conviction as to both Petitioners and remanding the causes "for further proceedings consistent with this opinion" due to conflicting inferences in the record as to whether the trial Court relied on the presumption invalidated in Leary v. United States, 395 U.S.6 (1969.)

On July 20, 1970, Petitioners re-appeared before the trial court for the spreading of the mandate. They moved for a New Trial and for setting aside the jury waiver. These motions were denied.

The matter was continued until August 10, 1970, at which time the trial court vacated the judgments, reviewed the evidence and reimposed the judgments. (R.T. 7.)

Notice of Appeal and Designation of Record on Appeal were filed on August 10, 1970 (R.T. 8.) On April 13, 1971, the Ninth Circuit Court of Appeals affirmed the judgments of conviction. This case is properly before this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED ON.

Relied on are Amendments V and VI of the United States Constitution and 21 U.S.C. 176 (a).

STATEMENT OF FACTS

Walter F. Stewart testified that he was a customs inspector employed by the Treasury Department and that on December 16, 1967, he was on duty at the Port of Entry, San Ysidro, California, at the Mexican border, on the vehicle inspection line. At 8:20 P.M., a man (later identified as Michael Lee Bucher) attempted to pass through, driving a 1957 Oldsmobile. Bucher, whom the witness determined to be a sailor in the United States Navy, declared that he was a United States citizen, that he was "not bringing anything from Mexico", and that he was home on leave. (R.T. 21-22, 32.)

The customs inspector then detained the sailor in the "secondary inspection area", took him into the office, and directed another customs inspector to "watch" him. This activity, according to the customs inspector, was based on nothing more than his "vague dissatisfaction" with the sailor's responses to his questions. Returning to the car, the inspector conducted a search which revealed the presence of a total of 74 kilogram-bricks of marijuana in the four

fenders and in two compartments beneath the front seat. It was established by stipulation that the 74 bricks were composed of marijuana. Various photographs (Exhibits 2-A through 2-J) were introduced in evidence, showing the portions of the car in which the marijuana had been secreted. After finding the marijuana, Agent Stewart returned to the office, "placed the subject under arrest", and searched him, and then called in customs agent David Smith, who took charge of the investigation. (R.T. 22-28,32,34.)

On cross-examination, it was established that the agents had no warrant for the search of this car. The witness testified that in conducting the search of the car, he was carrying out a duty to detect taxable merchandise, and to detect "illegal" matter, such as marijuana, which was "not allowed" in the United States. Although Bucher did not produce a certificate showing payment of tax, the witness admitted on his part that before deciding to search, he never asked Bucher whether he had a permit from the Secretary of State to import marijuana. (R.T. 21-35.)

Customs Agent David Smith testified that he took custody of Bucher and of the car, and that he asked Bucher if he would "cooperate" with the Government in delivering the marijuana. Bucher, who remained in custody throughout the ensuing events leading to the arrest of Petitioners, called his father and his father's lawyer, and then said that he would cooperate. (R.T. 35-54.)

Bucher, who had revealed under questioning in San Ysidro that this was not the first smuggling operation in which he had been involved, was told that <u>if</u> he cooperated, his cooperation would be made known to the prosecutors and to the courts. (R.T. 75-76, 51.) Further, he was told that usually in cases of this type, and provided that his cooperation produced "successful results", the cooperative arrestee would be allowed to plead guilty to violation of the Marijuana Tax Act, and that the smuggling charge would be dismissed. (R.T. 52-53.) The record reveals that, in fact, Bucher was prosecuted separately from Petitioners, in San Diego.

After Bucher's cooperation had been secured, all of the marijuana was removed from the car, and one kilo (Exhibit No. 4, R.T. 40-41.) was then placed in the trunk, which had previously been empty of marijuana. (R.T. 37,47,48.) Then Bucher and Smith drove north in the "load vehicle", followed by a government car driven by investigators White and Toft. (R.T. 37,42.) At midnight, (at 2:00 A.M., per cross-examination, R.T. 49) the group arrived in Los Angeles, met other government agents at the Los Angeles Office, and proceeded to Vernon Street. (R.T. 37-38.) At this point, Bucher made a telephone call, which was monitored by an agent named Hopkins. (R.T.38, 42.) Earlier, Bucher had given agent Smith a piece of paper (Exhibit 5) with the number "296-6431" written on it, followed by the letter "O". Smith testified that Bucher had told him that the letter "O" was meant to designate Petitioner Odell Andrews, and that the person who had given him the piece of paper had told him that he "was supposed to call" that number and contact Petitioner Odell Andrews, or one or two other people if Andrews was not there. (R.T. 38.)

Defense counsel then moved to strike these two references to Petitioner Andrews.(R.T. 38,39.) The court responded that it preferred to hear these matters directly from Bucher, rather than through the testimony of agent Smith. (R.T.39.)

After the phone call on Vernon Avenue, Smith got into agent Hopkins' car, and the two agents followed Bucher to the intersection of Sixth Street and Vernon, where Bucher parked. After ten minutes, from a vantage point one-half block down Sixth Street, Agent Smith saw an unknown vehicle stop momentarily beside Bucher's car, and then drive into a parking lot. Bucher followed this vehicle. Then Bucher's car was seen driving away, now with a passenger who was not clearly visible enough to be identifiable. Bucher's car now parked in the 3900-block of Sixth Avenue, and other agents took up a surveillance. Meanwhile, Agents Smith and Hopkins became lost, and after about an hour they got back to the 3900-block of Sixth Avenue and saw Petitioners Odell Andrews and Willie Sloan, who were then under arrest. (R.T. 43-51.)

In view of the unfortunate loss of agents Smith and Hopkins from the scene of action, the burden of going forward with significant evidence devolved next upon Treasury Agent Donald Cunningham. Cunningham was stationed at San Diego on December 16th and 17th of 1967. He was told by his superiors to go to Sixth Avenue and Vernon Street in Los Angeles to participate in the surveillance of Bucher's car. At that time, he was briefed on the previous events, including the fact that Bucher was to make a telephone call, announcing his presence to suspects in Los Angeles. (R.T. 55-57)

The call was made at 3:00 A.M. Cunningham was present with Bucher and "the agent" (presumably agent Hopkins -- see testimony of agent Smith, (R.T. 38) but Cunningham was not able to hear what was said. (R.T. 56-57.) After the phone call, Bucher was told by the agents to drive, as he then did, to Sixth Avenue and Vernon. When Bucher had arrived there, Cunningham took up a position of surveillance about one block away. (R.T. 57,72.) Bucher had been instructed by the agents to accompany whatever person or

persons might arrive to pick him up. In about ten to fifteen minutes, a 1958 Oldsmobile (depicted in Exhibit 3, a photograph, R.T.67-68.) passed Cunningham's surveillance point, and pulled up beside the load car. Then the load car drove by the surveillance point, now occupied by two persons. (R.T. 58) Apparently Bucher was driving the load car.(R.T. 76.)

Cunningham followed the load car down Sixth Avenue, until it parked in the 3600 block. Cunningham then drove around the block, and when he returned, he discovered that the load car was gone -- or, as he put it, it "had moved from the curb". He observed that in a garage to the rear of a house near which the load car had been parked, a light was burning. He then drove around the corner, returned on foot and looked at the garage. Apparently Cunningham was accompanied by other agents. Cunningham testified that he remained "in front of the garage", which implied that he immediately went upon the property, but he probably did not mean that he immediately did so. (R.T. 58-62.)

From his position, which was apparently on the sidewalk, Cunningham observed that the garage door was of the "tilting" variety, and that it was open about one foot at the bottom. He was able to see only the feet of what appeared to be three persons inside. Although he could not see the owners of the feet, he thought that he recognized the load vehicle within the garage. (R.T.58-59.) In a few minutes, Bucher walked out of the garage, and held a conversation with Cunningham, who then went to the area of the garage and arrested Petitioner Odell Andrews as he emerged. (R.T. 60.) Cunningham's testimony on direct examination was that Bucher had emerged from "the front of the house" (R.T. 60.) but on cross-examination, it was made clear that Cunningham meant that he had emerged from the garage, and that apparently he had been in the garage continuously from the time that Cunningham had returned to the scene until he came out and held the conversation. (R.T. 73-74.)

The government played, over objection, a tape recording which had been made of a conversation between Bucher and a person whom he

addressed therein as "Gene". During this conversation, Bucher said "I have got around 70", and mentioned the figure, "twenty-eight". Bucher, when he testified, explained that the term "seventy" meant "70 kilograms of marijuana", and that the term "twenty-eight" meant a price of $28 per kilogram. (R.T. 69-70.) It was further developed on cross-examination that the agents had no warrants to search or to arrest, no permission to enter upon the premises, and no permission to open the trunk of the load car. (R.T. 74-75.)

Fifteen to twenty seconds after Petitioner Andrews was arrested, his co-defendant, Willie Sloan, came out of the garage and was arrested by another agent. (R.T. 63,68.) Thereupon, Cunningham went into the garage and discovered that the load car was indeed within it. He further observed that both headlights and the right rear tail-light had been removed from it, and that the floor mat had been pulled back, so that the two compartments beneath the seat were exposed. The trunk of the car was still closed and locked. By removing a key from the ignition,

Cunningham opened the trunk, and discovered that the one-kilogram brick of marijuana which the agents had placed therein was still present. (R.T. 63,64,65,72.)

On cross-examination, in addition to items previously noted, it was developed that at all times after the initial arrest and seizure at San Ysidro, the brick of marijuana which was placed in the trunk remained in the custody and control of the Treasury agents. Therefore, defense took the position that the brick of marijuana, the only brick actually brought into the country, was not unlawfully imported. (R.T. 76-77.)

The next witness against Petitioners was the sailor, Michael Bucher. He testified that as of May, 1968, he had been in the Navy for about a year. As to his arrest and subsequent cooperation, he testified that at the border he was stopped by "an agent" who "asked" him to wait in the office while the car was searched. He was then told that he was under arrest for smuggling marijuana into the United States. He was advised by his attorney and by his father

to cooperate with the authorities, and he did so. On cross-examination, he testified that he remained in custody from the time of his arrest until he was released in San Diego on his own recognizance. He said that he was testifying against Petitioners because he hoped that it would help him in his case. (R.T. 81,87,88,128.)

Bucher testified over defense objections that the testimony was hearsay (R.T. 84) that he was given information and instructions in Mexico by an unindicted suspect named "Buck Robinson". The court received this testimony on the theory that, although it was not admissible to connect Petitioners to the alleged conspiracy, it was admissible to prove that a conspiracy existed. (R.T. 84-86.)

Bucher testified that on December 16 or December 17, 1967, while he was in the home of his girl friend in Tijuana, Robinson asked him to drive a load of marijuana to Los Angeles. Bucher agreed. Robinson told him that when he arrived in Los Angeles he was to call a man whom Robinson identified only as "Gene". Bucher testified that Robinson gave him a slip of paper

which bore the number "296-6431". He further testified over renewed hearsay objection that the letter "O" which followed the number signified the name "Odell". He was then permitted to testify that the "Odell" in question was in fact Petitioner Odell Andrews. (R.T. 84,87-91.)

When Bucher placed the telephone call, the person who answered was not Andrews but "Gene". (R.T. 91.) Evidently, "Gene" was the Gene Conley Christian, who was indicted along with Petitioners, but never brought to trial. Bucher identified a photo, Exhibit 8, as a photo of Christian. (R.T. 91.) Bucher then testified that the recording of the telephone call, previously mentioned in the testimony of agents Smith and Cunningham, was done with his "consent", (R.T. 98.) and the court found that Bucher had agreed to cooperate. (R.T. 140.)

The defense objected to the introduction in evidence of the recording of Bucher's conversation with Christian, on the ground that the conversation was not in furtherance of the alleged conspiracy, but in derogation of it, since the object of the conspiracy was to bring

marijuana across the border without paying tax, and since this object had been frustrated by Bucher's apprehension. (R.T. 92-100.) The objection was overruled, the court holding that the object of the conspiracy was not merely to bring the marijuana across the border but to bring it to Los Angeles. (R.T. 99-100.)

Further recounting the alleged events of December 17, Bucher testified that the person who met him at Sixth Avenue and Vernon was Petitioner Sloan, who got into the load car and told him to drive to a house where he had previously unloaded marijuana. (R.T. 106-107.) Defense counsel moved to strike the testimony as to the prior unloading on the ground that it was volunteered by the witness, and the court apparently granted the motion. (R.T. 107.)

Resuming his account of the events in question, Bucher testified that while they were driving to their destination, Sloan commented that "the police" were behind them, and told him to pull over, whereupon a car went by. Then, following Sloan's instructions, Bucher drove the car into a driveway and then into a garage. (R.T.107-108.)

Bucher then claimed that in this garage he saw Andrews, who, with Sloan, began to remove the headlights and tail-lights from the car. (R.T. 109-110.) He testified that Petitioner Andrews had a screwdriver. (R.T. 134.) "They" asked Bucher to look under the front seat and to start taking marijuana from beneath it. When no marijuana was found, Petitioners asked Bucher where the marijuana was. After telling "them" that "they" must have missed it when "they" were loading (sic) the car, Bucher walked outside and met the Los Angeles agents. (R.T.110-111, 124,126.)

It was brought out on cross-examination that on December 19, Bucher had made a transcribed statement in San Ysidro, (R.T. 121.) and that although in that statement he related a story about the occurrences in the garage, there was nothing in it attributing to either Petitioner any statement or question about the missing marijuana. (R.T. 132.)

On "rebuttal" (R.T. 199.) the prosecutor was permitted, over objection, to elicit from Bucher the claim that on Wednesday, December 14,

1967, three days before the incident in question, in a garage which Bucher said was at Andrews' house, he delivered to co-defendant Sloan sixty-nine kilos of marijuana, using the same car which he had used on the occasion in question. He further testified that on that occasion, Andrews was present. (R.T. 202-204.)

Two witnesses, one from the Pacific Telephone Company and the other an apartment house manager, were presented in an effort to connect the telephone number on Bucher's slip of paper, 296-6431, with Petitioner Andrews. Not only did the evidence fail to create a connection between the phone number and Petitioner Andrews, but, as Petitioner Andrews reads it, it tended to establish the negative of the proposition.

The second witness in sequence, but the first in logical presentation, was the apartment house manager, Myrtle Blevins. She testified that she managed an apartment house at 4145 Tenth Avenue, Los Angeles. Over objection that the evidence contained hearsay and denied the defendants the right of confrontation, she testified that Apartment No. 2 at that address was

rented by a person who gave his name as Gene Christian. She testified that Government Exhibit No. 8 (a photograph of Christian) resembled her tenant, but that she could not make a positive identification. Over defense hearsay objection, the court received Government Exhibit No. 15, a document showing references originally given by "Christian" to the apartment manager, including the names of both Petitioners. (R.T. 158-68.) Later, however, when this exhibit was offered in evidence "to show a connection between the person identified as Gene Christian and the defendants", the court rejected it, along with Exhibit No. 8, the photo of Gene Christian. (R.T. 185.)

"Christian" moved in the apartment in September, 1967. He occupied it and paid the monthly rent for four or five months, and he was the tenant in the month of December, 1967. Cross-examination developed that no one shared the apartment with "Christian". (R.T. 166-168.)

The representative of the Telephone Company, Christine Welter, testified, over repeated objections that the use of the business records

involved hearsay and denied the defendants the right of confrontation. The government drew from the witness the following items of "information":

(1) As of the period from November 3, 1967, to December 4, 1967, the telephone number in question was carried on the company records in the name of Petitioner Odell Andrews. (R.T. 150-151.) The trial court commented that "I don't think who the registered owner was as of December 4th certainly would not carry much weight. I will deny the motion to strike. I can tell you it doesn't carry much weight." (R.T. 151.) (emphasis supplied.)

(2) An order for installation of telephone service can be made and accepted by telephone. (R.T. 153.)

(3) The address in which the phone was installed was Apartment No. 2, at 4145 Tenth Avenue. (Not 3908 Sixth Avenue.) (R.T. 153.)

(4) Further records, introduced upon the recalling of the witness, showed the same name (Andrews) and address (4145 Tenth Avenue, Apartment No. 2) for this phone number for the period of December 3, 1967, through January 4, 1968. (R.T. 210.)

(5) Service was cancelled as of February 1, 1968. (R.T. 210-211.)

(6) On cross-examination, it appeared that the records of February 1, February 7 and March 1, 1968, showed the notations, "Received per sub. not responsible", and "sent letter. No longer is responsible". The account was "written off" as of February 5, 1968. (R.T.212-213.)

(7) Defense Exhibits "A" and "B" were marked for identification. "A" was a letter from the telephone company to Andrews, dated March 4, 1968, and "B" was a letter from Andrews to the company, dated February 28, 1968. (R.T. 214-216.)

In summary, the foregoing evidence from the apartment manager and the telephone company showed:

(1) "Gene Christian" rented an apartment at 4145 Tenth Avenue from the period, approximately, from September, 1967, through January, 1968.

(2) He had no co-tenant.

(3) In his apartment was a telephone.

(4) This telephone, number 296-6431, (said by Bucher to have been said by Robinson to refer to Petitioner Andrews) was placed by <u>someone</u> in the name of Petitioner Andrews.

It may be noted that there was no evidence offered to show that Petitioner Andrews ever paid for the service, or indeed, who did so.

Called as a witness on surrebuttal, Petitioner Andrews testified in relation to Defense Exhibit "B", that in February, 1968, he sent the exhibit to the phone company, because he had no knowledge of the listing of that telephone number (296-6431) in his name, and because he had never authorized anyone to list a telephone number in his name. (R.T. 223-224.)

Petitioner Willie Sloan testified on his own behalf (R.T. 189-199.) On direct examination, he testified only to the following matters: (1) His employment and lack of prior record. (R.T. 189.) (2) The fact that he met Bucher on the night in question and directed him to Andrews house on Sixth Street and into the garage. (R.T. 189-191.) (3) That neither he nor Andrews removed any parts of the car. (R.T. 192-193.) (4) Petitioner Andrews was not in the garage when the car arrived, but entered shortly thereafter, looking sleepy. (R.T. 191.) (5) At this point, Bucher started to remove a tail-light from the car, saying "I have got something to show you." (R.T. 192.) (6) The witness did not know that there was any marijuana in the car. (R.T. 193.) Bucher ran out of the garage after removing a tail-light, appearing to be shocked. When the witness and Andrews ran out after him, both were arrested. (R.T. 192-193.)

On cross-examination, the prosecutor's interest oscillated between the events of the night in question and Sloan's recollections of things past. Under this questioning, Sloan

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admitted that he had known Bucher in the past, had known a James Clark in the past, and that Clark had asked him to meet Bucher, that he had known Gene Christian in the past, and that Bucher had visited Christian's house in the past. He thought that it was unusual to be directing Bucher to Petitioner's garage at 3:00 A.M. He denied being "aware" that Bucher drove load cars. He also denied being "aware" of the unevidenced but suggested fact that his friend, Mr. Clark, drove load cars. (R.T. 194-197.) The prosecutor then terminated his cross-examination. However, he asked and received permission to "ask one more question", and this question was whether Sloan had ever met with Bucher, Christian, Andrews, Clark, Robinson, or any combination of those persons, when transactions in marijuana were taking place. To this the witness answered, "No." (R.T. 198.)

In "rebuttal", Bucher testified on behalf of the prosecution that he knew the Mr. Clark who had been claimed by Sloan to have been the person who directed him to meet Bucher on the night in question, but denied that Clark had been a party

to his earlier phone conversation with Christian. He then testified, as mentioned hereinabove, that on December 14 he had delivered 69 kilos of marijuana to Sloan in Andrews' presence. (R.T. 201-204.) This testimony was received after the defense attorney first raised an objection that it had not been shown that the substance claimed by Bucher to be marijuana was marijuana in fact, and after the court ruled that it was proper to receive the evidence as rebuttal, to impeach Sloan's denial that he had ever been present during any marijuana "transactions" which had taken place involving others alleged to have been involved in the instant charges. (R.T.200-201.)

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I

AFTER RELYING ON THE PRESUMPTION DECLARED UNCONSTITUTIONAL IN THE LEARY CASE AND AFTER THE APPELLATE COURT REVERSED THE CAUSE, THE TRIAL JUDGE DECLINED TO PERMIT NEW EVIDENCE OR A NEW TRIAL BUT SIMPLY STATED THAT HE HAD NOT RELIED ON THE PRESUMPTION TO SHOW KNOWLEDGE OF ILLEGAL IMPORTATION IN THE FIRST INSTANCE, BUT RATHER BASED HIS FINDINGS ON INDEPENDENT EVIDENCE. HOWEVER, NO SUCH EVIDENCE EXISTED. MOREOVER, THIS COURT SHOULD NOT PLACE ITS IMPRIMATUR ON A METHOD SO SUSCEPTIBLE OF DENYING THE DEFENDANT A FAIR HEARING.

The evidence was clear at the initial trial and is further outlined in Argument IV that there was no proof that Petitioners knew that the one kilogram of marijuana came from Mexico, in fact, they had no knowledge that it was even in the car where it was secretly placed by a Custom's Agent. Nevertheless, the trial judge at the first trial declared both Petitioners guilty of two counts of violating 21 U.S.C. 176(a). A brief capsulation of the trial demonstrates with abundant clarity that the Trial Judge relied on the presumption that proof of possession of

marijuana permitted a finding of guilt. That presumption, of course, was declared unconstitutional in Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532 (1969.)

To begin with, counsel for the defence argued that the presumption only applied in jury trials. (R.T. 7-8, discussed more fully in Argument II, infra.) The Court rejected this contention, however, and held the presumption applicable to Court trials. (Ibid.) In discussing the case and the presumption, the following colloquy took place:

"MR. MARKS: (Defence Counsel): We talk about a question of possession. Possession is the key, as I understand it, to everything that is resolved in these particular cases.

"THE COURT: Possession is the key to the imputing of knowledge that it was imported contrary to law."
(R.T. 241.)

Other instances abound in the record illustrative of the Court's reliance on the presumption. (R.T. 6, 7-8, 145, 242.)

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The Ninth Circuit Court of Appeals reversed the cause under the Leary decision and remanded the case, due to an inability to say from the record that the Court did not rely on the unconstitutional presumption. This should have resulted in a new trial. As the Circuit Court opined:

> "... some of the District Court's remarks at the close of the trial suggest that it could have found knowledge of illegal importation without regard to the presumption, but other remarks suggest to the contrary. The government cannot [illegible] to [illegible] that on [illegible] obviously [illegible]." (See Appendix "B", Ct.Op., May 11, 1970.) (emphasis supplied.)

The convictions were reversed and the causes remanded "for further proceedings consistent with this opinion." (Ibid.)

When the case was returned to the trial court below, he denied a motion to withdraw the jury waiver and the motion for a new trial, took no additional evidence and merely stated

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presumption in the first place. (R.T. 7.)

As indicated above and argued extensively in Argument IV, there wasn't any admissible evidence upon which the Court could have concluded that Petitioners had knowledge of the illegal importation. The Court of Appeals correctly characterized the evidence as "weak". Thus, the judgment is without legal foundation. Moreover, it is at war with common sense to merely remand a case to a judge, telling him what all he has to do in order to reinstate the verdict is: imply to prove that he didn't rely on the presumption habitually relied on at the time of the initial trial. cf. Cuellar v. United States, (9th Cir.1970), 405 F2d 720. Such a proposition easily could lead to a withering away of the Constitutional guarantee of fair trial.

In the present case, the Circuit Court simply affirmed the conviction leaving a graphic irony. Many sound arguments were urged before the Ninth Circuit Court of Appeals but the majority opinion found it not so squarely in point that the issues were resolved with

[illegible] were they discuss[illegible] in the second opinion. Thus, the only issue examined on appeal [illegible] has been the Court's reli[illegible] on the presumption outlined by [illegible] and [illegible]. [illegible] Hence, retroactive guilty-pleading has led to an [illegible] unconstitutional verdict.

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PETITIONERS WERE COERCED INTO WAIVING
THEIR RIGHT TO A JURY TRIAL BY VIRTUE
OF THE PRESUMPTION [illegible] 21 U.S.C. 176(a)
[illegible] THEIR JURY BUT NOT THE
COURT TO PRESUME WILLFULNESS OR
KNOWLEDGE OF ILLEGALITY ON ALL BUSINESS
FIRMS ENGAGED IN TRADE OR COMMERCE.

The question presented herein is the scope of this Court's significant decision in United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209 (1968).

21 U.S.C. 176(a) permits a person found in possession of marijuana to be convicted, [illegible] on that fact alone, unless he satisfies his jury to the contrary. In doing so, the jury may presume that the marijuana had been illegally imported contrary to law, that the defendant knew it and manipulated it in some manner. There is no [illegible] Action by Union -- [illegible] -- the judge may escape his responsibility to find each of these elements to have been proved beyond all reasonable doubt.

At the outset of the proceedings herein, the [illegible] requested the trial court to rule, alternatively, either that the statutory

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390 U.S. 581, 88 S.Ct.

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be aligned with the conspiracy in order to supply the deficiencies in the prosecution's case. It is submitted that the information accredited to "Buck" Robinson, whoever he is, in Mexico, was the core of the Government's case but that that information was inadmissible as violative of recent decisions of this Court interpreting and giving body to the Confrontation Clause of the Sixth Amendment to the United States Constitution. In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065 (1965) and Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074 (1965), this Court manifested the viability and importance of that Clause by reversing cases wherein the right to cross-examine was fanciful. In Pointer, this Court held that the Right applied to the States through the 14th Amendment and specifically reversed a conviction wherein unexamined testimony given at a preliminary hearing was used in the trial itself. How much more violative of the right to confront witnesses is the admission of a hearsay declaration of someone who is merely asserted to exist and who, despite the best efforts of the defense, cannot be summoned into the courtroom to either verify

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expressly prohibits a conspiracy to commit any of the substantive offenses defined by the section ... Since each of the substantive offenses under Section 174 requires proof of specific knowledge by the defendant that the heroin was illegally imported, the same specific knowledge is also an essential element of a conspiracy to commit these substantive offenses ...

"The conspiracy to sell heroin to which the trial court found the defendant and Correa parties was a violation of state law. The only additional element required to make out a conspiracy violative of 21 U.S.C. Section 174, 21 U.S.C.A. Section 174, was knowledge that the drugs were illegally imported. This was the element essential to federal jurisdiction. If it could be supplied by proof of actual or constructive possession by any one party to the conspiracy prohibited by state law -- proof which would be available in virtually all cases -- then the purported limitation upon federal jurisdiction would have no real substance, and the state law no real function. The state prohibited conspiracy would serve as a virtually automatic means of imputing, as a matter of law, the missing basis for federal

jurisdiction. At a minimum, we should be slow to read the statute as permitting so tenuous a substitute for proof of that element of the federal offense which provides its constitutional basis."

Thus, what facts are there in the instant case which show a quantity of marijuana which the defendants having knowledge that it was brought into the country contrary to law, conspired to manipulate, or which the defendants knowing that the contraband had been imported contrary to law did, in fact, receive, conceal or facilitate the sale of.

At page 250 of the Trial Transcript, lines 11 through 25, the record shows that the trial court based its finding of guilt as to Count II, the substantive Count, on the following grounds:

"As to Count Two, I find the defendant Andrews guilty of receiving the one kilo. And I conclude that both defendant Andrews and defendant Sloan had knowledge of the importation of the marijuana, and I conclude that from the statements they made in the garage.

"I do conclude that they did make those statements, as to "Where is the

marijuana?" I conclude that they did search back of the headlights -- at least one of the headlights and the tail light, looking for the marijuana, which they believed was there.

"I think also that they had possession of the marijuana, at least of one kilo of marijuana, insofar as the car was concerned, because the car was, in effect, in their possession with the marijuana in it."

Petitioners contend that regardless of all the evidence in the case, whether admissible or inadmissible, the necessary knowledgeable possession of the brick which the agents planted in the trunk of the car cannot be charged to them. The entire theory of the Government's case was that Petitioners did not believe or know that there was any contraband in the trunk of the car. Before one can be held guilty of possession, it must be proved that he knew of the presence of the thing which is said to have been possessed. All authorities are unanimous on this fundamental proposition. (See, e.g. Delgado v. United States (C.A. 9th) (1964) 327 F 2d 641; People v. Gory (1946) 28 C2d 450; People v. Monson (1967) 255 C.A. 2d 689.)

At the border, the agents discovered marijuana in the fenders and beneath the seats of the "load" car. There was nothing in the trunk until the agents placed it there. Apart

from the Government's theories of the case, which were that Petitioners were informed as to the locations within the car where marijuana would be secreted, and that their conduct in looking into the fender betrayed this state of mind, it is obvious that the last place wherein a visible quantity of marijuana would ordinarily be placed within a transporting vehicle would be in the trunk. Therefore, it was a departure both from the Government's theses in the case and from common experience to believe that Petitioners, by looking under the fenders of a car which they did not own, thereby acquired conscious dominion and control over the marijuana which unbeknownst to them had been secreted in the trunk. An expectation that they were to receive marijuana does not equate with the required possession of it.

Thus, it is apparent that Petitioners could not be guilty of conspiring to deal in contraband which they knew had been imported contrary to law, inasmuch as their efforts to ascertain whether marijuana had in fact been brought to them were unsuccessful. Furthermore,

their inability to discover whether there was such contraband illuminates unequivocally the dearth of proof that they dealt with it in any manner, much less criminally. A conviction left untouched would posit two intolerable propositions in our law: one, that federal jurisdiction is irrelevant to federal prosecution; (see Hernandez, supra) and two, to permit a conviction to stand without any evidence of guilt. See Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960); Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248 (1961).

CONCLUSION

Petitioners respectfully pray that the Petition for Certiorari should be granted and the judgments reversed.

Luke McKissack

LUKE McKISSACK
Attorney for Petitioners

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WM. B. LUCK, CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff and Appellee, vs. ODELL ANDREWS and WILLIE SLOAN, Appellants.	No. 26,567

On Appeal from the United States District Court for the Central District of California

Before: CHAMBERS, HUFSTEDLER and WRIGHT, Circuit Judges.

Per curiam:

The judgment of conviction after remand of this judge-tried case is affirmed.

We hold it was not necessary to have a whole new trial or to let defendant have a second chance with a jury instead of a judge.

A close parallel is found in the case of Campbell v. United States, 365 U.S. 85.

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ODELL ANDREWS, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee.*	No. 22,995
WILLIE SLOAN, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee.*	No. 22,996

[May 11, 1970]

Appeal from the United States District Court
for the Central District of California

Before: DUNIWAY, HUFSTEDLER, and KILKENNY, Circuit Judges

HUFSTEDLER, Circuit Judge:

Defendants Andrews and Sloan were found guilty after a nonjury trial of both counts of a two-count indictment charging violation of 21 U.S.C. § 176a. Count One charged a conspiracy to import, receive, and conceal marihuana imported from Mexico, and Count Two charged receipt and concealment of the marihuana. The convictions must be reversed on the authority of *Leary v. United States* (1969) 395 U.S. 6 and *United States v. Scott* (9th Cir. 1970) ____ F.2d ____.*

*Slip opinion March 6, 1970.

EXHIBIT "B"

The section 176a presumption of knowledge of illegal importation is phrased in mandatory terms; prior to its invalidation by *Leary*, the district court was required to apply it. (*See Qualen v. United States* (9th Cir. 1970) ..... F.2d .....)** In addition to applying the presumption, however, the court could also have made a finding of knowledge from actual evidence. Had the court below relied exclusively on the finding of knowledge from evidence independent of the presumption and were such finding not clearly erroneous, application of the presumption would be harmless error.

On the record before us, however, we cannot determine whether the court made an independent finding of knowledge without the benefit of the presumption. We have no special findings. As in *Howard v. United States* (9th Cir. 1970) ..... F.2d .....,*** some of the district court's remarks at the close of trial suggest that it could have found knowledge of illegal importation without regard to the presumption, but other remarks suggest to the contrary.[1] The evidence admitted for substantive purposes amounted to a weak showing on actual knowledge, and the Government did not at trial seriously argue that actual knowledge was shown.

**Slip opinion March 13, 1970.

***Slip opinion March 24, 1970.

[1]"As to Count Two, I find the defendant Andrews guilty of receiving the one kilo. And I conclude that both defendant Andrews and defendant Sloan had knowledge of the importation of the marihuana, and I conclude that from the statement they made in the garage.

"I do conclude that they did make those statements, as to 'Where is the marihuana?' I conclude that they did search back of the headlights—at least one of the headlights and the tail light, looking for the marihuana, which they believed was there.

"I think also that they had possession of the marihuana, at least of one kilo of marihuana, insofar as the car was concerned, because the car was, in effect, in their possession with the marihuana in it."

This can be interpreted either as (a) two independent findings of knowledge, one based on actual evidence and one based on possession, or (b) as one finding of knowledge based on the actual evidence plus possession. Earlier the court stated: "Possession is the key to the imputing of the knowledge that it was imported contrary to law." And before trial the court rejected the defense's argument that the presumption could not be applied in a court trial.

The convictions therefore are REVERSED, and the causes are REMANDED for further proceedings consistent with this opinion.

KILKENNY, Dissenting:

The trial judge made a specific finding that each defendant had knowledge of the importation of the marihuana. There is nothing in the record to indicate that the judge in arriving at this specific finding was in any way relying on the statutory presumption.[1] The trial judge's reference, in his findings, to "possession of the marihuana", in my opinion, is clearly directed to *knowledge of the existence* of marihuana in the trunk of the automobile, rather than to *the possession* under the invalid § 176a presumption. Here, as distinguished from *Howard v. United States*, ... F.2d ..... (9th Cir., March 24, 1970), the findings are specific, rather than ambiguous.

I would affirm.

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[1] 21 U.S.C. § 176a.

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STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California 90028. On May 13, 1971, I served the within Petition for Writ of Certiorari on the plaintiff and respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

United States Attorney
12th Floor
United States Courthouse
Los Angeles, California 90012

U.S. Court of Appeals
Ninth Circuit
Post Office Box 547
San Francisco, California 94101

Solicitor General
Department of Justice
Washington, D. C. 20530

I declare that the foregoing is true and correct.

Executed on May 13, 1971, at Los Angeles, California.

Louise A. Monaco

Louise A. Monaco

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:

Benton v. *Maryland*, 395 U.S. 784	9
Campbell v. *United States*, 365 U.S. 85	7
Dutton v. *Evans*, 400 U.S. 74	8
Fiswick v. *United States*, 329 U.S. 211	8
Glasser v. *United States*, 315 U.S. 60	8
Krulewitch v. *United States*, 336 U.S. 440	8
Leary v. *United States*, 395 U.S. 6	2, 4, 6, 9
Lutwak v. *United States*, 344 U.S. 604	8
McClain v. *United States*, 417 F. 2d 489, certiorari denied, 397 U.S. 965	7, 10
McGee v. *United States*, No. 362, this Term, decided May 17, 1971	9
United States v. *Costello*, 352 F. 2d 848, reversed *sub nom. Marchetti* v. *United States*, 390 U.S. 39	8
United States v. *Jackson*, 390 U.S. 570	9, 10
United States v. *Shotwell Mfg. Co.*, 355 U.S. 233	7
Wong Sun v. *United States*, 371 U.S. 471	8

Constitution and statutes: Page

United States Constitution, Sixth Amendment 8
18 U.S.C. 4208(a)(2) 4
21 U.S.C. 174 10
21 U.S.C. 176a 2, 3, 4, 9, 10

Miscellaneous:

1 Wharton, *Criminal Evidence*, § 249 (1955) 7

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1710

ODELL ANDREWS and WILLIE SLOAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is reported at 439 F.2d 155. A prior opinion of the court of appeals in this case (Pet. App. B) is reported at 426 F. 2d 1304.[1]

[1] The majority opinion on the earlier appeal was amended, in a manner not material here, subsequent to its issuance. The copy of the opinion contained in Appendix B of the petition is the original version; the opinion as reported reflects

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1971. On May 13, 1971, Mr. Justice Douglas extended petitioners' time for filing a petition for a writ of certiorari until May 14, 1971, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, following reversal of petitioners' non-jury convictions for marihuana offenses on the basis of this Court's decision in *Leary* v. *United States*, 395 U.S. 6, striking down the provision in 21 U.S.C. 176a permitting knowledge of illegal importation of marihuana to be inferred from unexplained possession, it was proper for the district judge, without taking additional evidence, simply to state on the record that he then found the requisite knowledge of illegal importation from the totality of the evidence, without reliance on the statutory inference.

2. Whether inadmissible hearsay was received at the trial.

3. Whether the evidence supported the finding that petitioners possessed the marihuana involved in Count Two.

4. Whether petitioners were improperly coerced into waiving their right to a jury trial by the pro-

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the amendment. The amendment consisted of striking the first two sentences of the second paragraph of the opinion as originally issued and making the last sentence of that paragraph the first sentence of the next paragraph.

vision of 21 U.S.C. 176a authorizing conviction of marihuana offenses from proof of possession of the marihuana unless the possession is explained to the satisfaction "of the jury."

STATEMENT

1. Following a non-jury trial in the United States District Court for the Central District of California, petitioners were convicted on both counts of a two-count indictment charging that they, a codefendant named Gene Christian,[2] and two unindicted persons, Michael Bucher and Buck Robinson, had conspired to smuggle approximately 70 kilograms of marihuana into the United States from Mexico and to receive and conceal the same after its unlawful importation (Count One) and that petitioners had received, concealed, and facilitated the transportation of one kilogram of the marihuana with knowledge that it had been unlawfully imported (Count Two), in violation of 21 U.S.C. 176a (1 R. 4, 5; Pr. R. 2-5; Tr. 250-251).[3] Each petitioner was sentenced to five years' imprisonment on each count, the sentences to run

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[2] Christian, a fugitive, had not been apprehended as of the time of the trial (Tr. 236).

[3] "1 R." and "2 R." refer to the certified record, in two volumes, of the district court proceedings following the court of appeals' first decision (reversing petitioners' original convictions and remanding for further proceedings, see *infra*). "Pr. R." refers to the certified clerk's record (marked "prior case" on the cover) of the original trial proceedings, consisting of the indictment and pre-remand pleadings. Both records are on file in the Clerk's office. "Tr." refers to the trial transcript, a copy of which is being lodged herewith.

concurrently. Pursuant to 18 U.S.C. 4208(a)(2), each was declared eligible for parole at such time as the Board of Parole should direct (Pr. R. 30, 31).

On petitioners' initial appeal, the court of appeals reversed the convictions and remanded the case for further proceedings, because it was unclear to the court from the record whether the district court had relied on the provision in 21 U.S.C. 176a permitting knowledge of illegal importation—an element of the offense—to be inferred from the unsatisfactorily explained possession of marihuana, the provision later held invalid in *Leary* v. *United States*, 395 U.S. 6 (Pet. App. B). On remand, the district judge who had presided at the trial simply stated on the record, without taking additional evidence, that he had reviewed the trial transcript and was then finding from the totality of the evidence, without reliance on the statutory inference, that petitioners had known that the marihuana they had been found with had been unlawfully imported (1 R. 3; 2 R. 6-7).[4] The judgments of conviction and resultant sentences were thus reinstated (1 R. 4, 5; 2 R. 7-8). Thereafter another panel of the court of appeals unanimously affirmed (Pet. App. A).[5]

2. The underlying facts are as follows: On December 16, 1967, coconspirator Robinson asked co-

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[4] Petitioners' statement that the judge stated in the proceedings on remand that he had not relied on the statutory inference "in the first instance" (Pet. 23, 25-26) is incorrect. The pertinent finding was worded in the present tense.

[5] One judge—a member of the original majority—sat on both panels.

conspirator Bucher, in Mexico, to drive an automobile containing marihuana to Los Angeles (Tr. 81, 84). Bucher agreed and Robinson wrote a telephone number, followed by a dash and the letter "O," on a slip of paper which he gave Bucher so that Bucher would know whom to call when he arrived (Tr. 89-90). Robinson told Bucher that the "O" meant "Odell," which Bucher understood to refer to petitioner Odell Andrews—Bucher had met Andrews some ten times previously and had delivered marihuana to him at least once before in the same vehicle he used on this occasion. The telephone number was in fact listed in Andrews' name (Tr. 90, 149-150, 169-170, 203-204). Early that evening, pursuant to the agreement, Bucher drove a 1957 Oldsmobile, loaded with 74 kilograms of marihuana secreted in compartments behind the headlights and taillights and under the front seat, to San Ysidro, California, a port of entry. Customs agents there discovered and removed the marihuana and arrested Bucher, who, after consulting a lawyer, agreed to cooperate with the government (Tr. 21-26, 36-37, 40, 48, 87-88). An agent placed a one-kilogram brick of the confiscated marihuana back in the Oldsmobile, but in a part of it, the trunk compartment, where none had been previously (Tr. 47-48). Accompanied by agents, Bucher then proceeded to Los Angeles (Tr. 37, 42, 49).

After arriving in Los Angeles, Bucher called the number Robinson had given him and told codefendant Christian—who answered—that he had a 70-

kilogram load, that the price was $28 per kilo, and that Christian should "take care of it" (Tr. 88-89, 91, 101-104). Some fifteen minutes later, petitioner Sloan met Bucher, got into the Oldsmobile with him, and directed him to a garage at the rear of petitioner Andrews' house, where three days previously Bucher had made a 69-kilogram delivery of marihuana to petitioners in the same automobile (Tr. 43, 58-59, 106-108, 196, 203-204). Petitioner Andrews was waiting in the garage when Bucher and Sloan arrived (Tr. 109-110). Using pliers and a screwdriver, petitioners promptly started removing the headlights and taillights and told Bucher to start getting the marihuana out from under the front seat (Tr. 110, 117, 134-135). When Andrews, after removing a headlight, found the compartment in back of it empty, he asked Bucher where the marihuana was that was supposed to be there (Tr. 124). Sloan asked whether "they" had forgotten to put the marihuana in the space (Tr. 125-126). When, moments later, petitioners were arrested, Andrews had $2,000 in currency on his person (Tr. 60-62).

ARGUMENT

1. There is no merit to petitioners' contention that they were entitled to a new trial following the court of appeals' remand (Pet. 23-27). The sole reason for the remand was the court's uncertainty from the record whether the judge at the non-jury trial had relied on the statutory inference later invalidated in *Leary*. The terms of the limited remand were fully

complied with when the judge, following review of the evidence, stated on the record that he was then finding, from all the evidence and without reliance on the invalidated inference, that petitioners had known that the marihuana in question was illegally imported. If supported by the evidence, that finding was valid and made a new trial unnecessary. Cf. *Campbell* v. *United States*, 365 U.S. 85, 98-99; *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 245-246.

The evidence fully supported the finding. Here an actual smuggling scheme was involved and the evidence showed "actual knowledge of * * * the plan of illegal importation" (*McClain* v. *United States*, 417 F. 2d 489, 491-492 (C.A. 9), certiorari denied, 397 U.S. 965). Petitioners' activities in the garage, in attempting to find in the secret compartments of the loaded vehicle the marihuana that had been placed therein by Robinson in Mexico, warranted the inference that petitioners were well aware of the Mexican origin of the marihuana they were expecting to receive and that the plan contemplated its unlawful importation.

2. Robinson's statements to Bucher in Mexico, testified to by Bucher at trial, did not involve hearsay, as petitioners contend (Pet. 32-40). The statements were offered not as proof of the truth of the matter stated—the characteristic attribute of hearsay (1 Wharton, *Criminal Evidence*, § 249 (1955)) —but as evidence of the conspiracy. The statements, in substance a request by Robinson that Bucher de-

liver the marihuana to petitioner Andrews, thus, if probative, had "no special evidentiary hurdle to overcome" (*United States* v. *Costello*, 352 F. 2d 848, 854 (C.A. 2), reversed on other grounds *sub nom. Marchetti* v. *United States*, 390 U.S. 39). The request—to which Bucher directly attested—was plainly probative of the charged conspiracy. Moreover, to the extent Robinson's statements might arguably be deemed to have involved hearsay, they were in any event admissible under the so-called coconspirator exception to the hearsay rule—the principle that declarations by one conspirator, made during and in furtherance of the joint enterprise, are admissible against each coconspirator. *Wong Sun* v. *United States*, 371 U.S. 471, 490; *Lutwak* v. *United States*, 344 U.S. 604, 617-618; *Krulewitch* v. *United States*, 336 U.S. 440, 442-443; *Fiswick* v. *United States*, 329 U.S. 211, 217; *Glasser* v. *United States*, 315 U.S. 60, 74-75. That exception, contrary to a suggestion of petitioner (Pet. 37-40), does not violate the Confrontation Clause of the Sixth Amendment. *Dutton* v. *Evans*, 400 U.S. 74.

3. Petitioners contend that they cannot be deemed to have possessed the one-kilogram brick of marihuana that was in the trunk of the Oldsmobile when Bucher delivered the vehicle to them because they were unaware of its presence there, and that consequently their conviction on Count Two (charging that they received, concealed, and facilitated the transportation of this marihuana) cannot stand (Pet. 41-46). We submit, however, that the trial judge's finding that petitioners possessed this marihuana—

"because the car was * * * in their possession with the marihuana in it" (Tr. 250)—was, in the unique circumstances of this case, correct. While admittedly petitioners were unaware of the precise location of the marihuana in the car, the fact remains that they possessed an automobile which they believed contained and which did contain marihuana. Moreover, that marihuana had been part of the larger load they assumed was still there. At all events, since petitioners' sentences on Count Two are to run concurrently with their like sentences on the conspiracy count (the validity of which is not affected by the present contention), the concurrent sentence rule is applicable and consideration of the Count-Two conviction may be pretermitted as a matter of judicial convenience. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *McGee* v. *United States*, No. 362, this Term, decided May 17, 1971, slip op., p. 12, n. 15.

4. Petitioners' contention that they were coerced into waiving their right to a jury trial (Pet. 28-31) is without substance. They argue that because 21 U.S.C. 176a, prior to *Leary*, relieved a defendant from the statutory interference of illegal importation only if his possession of marihuana was explained to the satisfaction "of the jury," only "the jury" could make the statutorily authorized inference—the court sitting without a jury could not do so. Accused persons were thus allegedly subjected to undue pressure to forego their right to a jury trial and to elect to be tried by a judge in order to avoid the statutory inference. The rationale of *United States* v. *Jackson*,

390 U.S. 570 (holding invalid the provision of the Federal Kidnaping Act authorizing the death penalty only upon the jury's recommendation) is invoked. Petitioners, however, misconstrue the pertinent provision of 21 U.S.C. 176a; the term "jury" as used there and in similar statutes (*e.g.*, 21 U.S.C. 174) clearly was intended to refer generally to the trier of fact—whether a jury or the judge at a jury-waived trial. *McClain* v. *United States*, *supra*, 417 F. 2d at 492-493, and cases there cited. Hence the statutory inference could be applied by judge or jury alike and the rationale of *Jackson* is inapposite.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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